LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 29 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 470

FRANK GIANATASIO, JR.,

Petitioner,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, Commanding Officer, Company "A" 242nd Engineer Battalion (C) (A) CONNARNG, Stratford, Connecticut; MAJOR GENERAL E. DONALD WALSH, Adjutant General for the State of Connecticut; LIEUTENANT GENERAL JONATHAN O. SEAMAN, Commanding General, First United States Army, Fort George G. Meade, Maryland; and MAJOR GENERAL WINSTON P. WILSON, Chief, National Guard Bureau, Washington, D. C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAWRENCE P. WEISMAN
955 Main Street
Bridgeport, Connecticut 06603
Attorney for Petitioner

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
I.—Constitutional and Statutory Issues	5
II.—Persons Affected by Questions Presented	7
III.—Errors Below	8
Conclusion	9
Appendix A	
Statutes and Regulations	11
Appendix B	
Opinion of the United States Court of Appeals, Second Circuit	17
Opinion of the United States District Court, District of Connecticut	25
Memorandum of Decision	25
Judgment	30

PAGE

APPENDIX C

Enlistment Agreement 31

Exhibit A 33

TABLE OF AUTHORITIES CITED

Cases:

Breen v. Selective Service Local Board No. 16, 396 U.S. 460, 24 L. Ed.2d 653 (1970) 9

Even v. Clifford, 287 F. Supp. 334 (S.D. Cal., 1968) 8

Fox v. Brown, 402 F.2d 837 (2d Cir. 1968) 8

Gutknecht v. United States, 396 U.S. 295, 24 L. Ed.2d 532 (1970) 9

Pfile v. Corcoran, 287 F. Supp. 554 (D. Colo., 1968) 8

Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969) 6

Schwartz v. Franklin, 412 F.2d 763 (9th Cir. 1969) 8

United States ex rel. Caputo v. Sharp, 386 F. Supp. 516 (E.D. Pa., 1968) 9

Winters v. United States, 281 F. Supp. 289 (E.D.N.Y., 1968) 8

United States Constitution:

Fourth Amendment 2, 3

Fifth Amendment 2, 3

PAGE

Sixth Amendment 2, 3

Eighth Amendment 2, 3

Fourteenth Amendment 2, 3

Statutes:

10 U.S.C. 269(b) 3

10 U.S.C. 270(b) 3

10 U.S.C. 673a 2, 3, 9

28 U.S.C. 1254(1) 2

28 U.S.C. 1331 4

28 U.S.C. 1343 4

50 U.S.C. App. § 456(2)(A) 3

Regulations:

Army Regulation 135-91 ..... 2, 4

State of Connecticut Military Department Regulation No. 26 ..... 2, 4

32 C.F.R. 100.3 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

FRANK GIANATASIO, JR.,

Petitioner,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, Commanding Officer, Company "A" 242nd Engineer Battalion (C) (A) CONNARNG, Stratford, Connecticut; MAJOR GENERAL E. DONALD WALSH, Adjutant General for the State of Connecticut; LIEUTENANT GENERAL JONATHAN O. SEAMAN, Commanding General, First United States Army, Fort George G. Meade, Maryland; and MAJOR GENERAL WINSTON P. WILSON, Chief, National Guard Bureau, Washington, D. C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Frank Gianatasio, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 2, 1970.

Opinions Below

The opinion of the Court of Appeals is reprinted in Appendix B hereto. It is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Does the ordering of petitioner to active duty in the armed forces pursuant to 10 U.S.C. Sec. 673a constitute an impairment of his contractual rights in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

2. Does the ordering of petitioner to active duty in the armed forces pursuant to 10 U.S.C. Sec. 673a constitute the imposition of punishment without due process of law in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

3. Do Army Regulation 135-91, 10 U.S.C. Sec. 673a, and State of Connecticut Military Department Regulation Number 26 (Appendix A), on their faces and as applied in this case violate petitioner's rights under the Fourth and Fifth Amendments to the United States Constitution to be secure in his person and to earn a livelihood without unwarranted interference?

Constitutional Provisions, Statutes and Regulations Involved

The judgments of the courts below violate Petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The statutes and regulations involved are set forth in Appendix A to this petition.

Statement of the Case

On July 14, 1965, petitioner enlisted in the Connecticut Army National Guard. On that date, petitioner and a duly authorized representative of the National Guard executed an enlistment agreement (Appendix C), defining the term and extent of petitioner's obligation and reading in part as follows:

> "If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of forty-five days or be reported to Selective Service for immediate induction."

This provision is consistent with the relevant statutes then in effect, to-wit: 50 U.S.C. App. Sec. 456(2)(A). and 10 U.S.C. Sec. 270(b).

Two years later Congress enacted 10 U.S.C. Sec. 673a which made available a third alternative in the case of a Ready Reservist (which term, by virtue of 10 U.S.C. Sec. 269(b), includes a National Guardsman) who has allegedly participated unsatisfactorily in the activities of his unit.

Thereafter, 32 C.F.R. Sec. 100.3 and Army Regulation 135-91 were amended to provide that the procedure authorized by 10 U.S.C. Sec. 673a should be applied in *all* cases of unsatisfactory participation.

Petitioner sought to be excused from compliance with Regulation No. 26 of the State of Connecticut Military Department regarding length of hair, asserting that hair longer than that permitted by the Regulation was required in his full time civilian employment. Petitioner submitted to his commanding officer a letter from his employer in support of that request, which letter was never acknowledged.

On eleven occasions between January, 1969 and March, 1969, petitioner was cited by his commanding officer for "unsatisfactory participation" and charged with an unexcused "absence." On each such occasion, petitioner was physically present and in uniform.

On July 1, 1969, petitioner was ordered to report for active duty on August 7, 1969. Petitioner appealed that order and on August 27, 1969, was informed that his appeal had been disapproved and that he was ordered to report for active duty on September 10, 1969.

On August 28, 1969, petitioner instituted an action in the District Court. The jurisdiction of the District Court was invoked under 28 U.S.C. Secs. 1331 and 1343.

Following a hearing, the District Court denied petitioner's motion for a preliminary injunction and granted respondents' motion for summary judgment. That decision was affirmed by the Court of Appeals notwithstanding an approach to the facts of the matter which may fairly be described as sympathetic.

The District Court granted a stay pending appeal to the Court of Appeals. Subsequent to the rendering of its decision, the Court of Appeals granted petitioner's motion to stay the issuance of its mandate pending application to this Court for a writ of certiorari.

Reasons for Granting the Writ

Certiorari should be granted in this case (1) because it involves important questions of constitutional law, statutory interpretation and administrative procedure relating to due process and personal freedom which require settlement by this Court; (2) because it directly and immediately affects a very large number of men in the military Reserve; and (3) because of error by the lower Courts.

I.

Constitutional and Statutory Issues.

The Court is thoroughly familiar by now with the retroactivity and due process argument which petitioner would advance and no purpose would be served by repeating those arguments at length in this petition. However, the petitioner does wish to emphasize that his military service obligation and his substantive rights as a member of the Ready Reserve are governed not only by statute but by a web of federal regulations, Army regulations, executive orders and weekly bulletins which, although they change almost daily, must be read against the uniform background of petitioner's constitutional rights.

In order to give real meaning to petitioner's right to contract, the applicable rules must be limited to those in

existence at the moment of signing his enlistment agreement. Statutes, regulations and policies subsequently amended or enacted must be disregarded to the extent that they would alter or limit substantive rights previously acquired by contract.

One of the fundamental requirements of our legal system is that the sanctions to be imposed for violation of any statute or rule of law should be clearly ascertainable by all persons to whom that rule applies. Where, as here, the applicable rules and regulations are in constant flux, the only tool available for ascertaining the applicable sanction is the constitutionally protected right to contract which gives an individual the power to choose the moment of contracting to fix forever the sanctions which may be applied to punish him in case of a violation of the applicable rules.

While it is true that petitioner's enlistment contract imposes upon him the affirmative duty to "participate satisfactorily" in schedule drills, it is nothing more than semantic sleight of hand to equate purely subjective aesthetic considerations with satisfactory service. This is especially true in the case of a part-time member of the military whose appearance is required by his civilian employment to which he is obligated for 28 out of 30 days each month, the decision of the Second Circuit in *Raderman* v. *Kaine*, 411 F.2d 1102 (CA 2, 1969) to the contrary notwithstanding.

To say, as did both of the lower Courts in this case, that petitioner "could have worn an appropriate wig, thereby complying with military requirements and satisfying the appearance needs of his job," is to evade completely the issue of personal freedom. Neither court specified whether

this gratuitous statement was meant to convey the suggestion that petitioner might retain his long hair and wear a short hair wig to his military exercises, or whether he should cut his hair to satisfy military requirements and wear a long hair wig to his civilian employment. The Connecticut National Guard has explicitly rejected the former interpretation, thereby leaving unanswered the question of the extent to which petitioner's personal freedom may be abridged to satisfy the purely aesthetic requirements imposed by the military.

II.

Persons Affected by Questions Presented.

A further ground for the granting of certiorari in this case is that it directly and immediately affects a substantial number of Reservists not yet on active duty.

According to a National magazine, "(H)air is the perennial, universal protest banner among 600,000 'involuntary' reservists—most of whom endure five and one-half years of weekend drills as a patriotic alternative to getting drafted. They are fiercely civilian 28 days a month. On the 29th, they confront military regimentation with resignation, resentment or mischief." Look magazine, August 12, 1969, page 36 and ff.

The magnitude of the problem created by the fact that the military regulations concerning length of hair have not kept pace with the prevailing style among civilians is amply illustrated by the large number of articles which have appeared in national publications during the last year. In addition to the Look magazine article cited above, articles

have appeared in TIME magazine, September 5, 1969, pp. 43 and 44, and in the NEW YORK TIMES on at least seven occasions since August, 1969.* It is therefore apparent that a substantial number of Reservists have been and will continue to be affected by the application and judicial construction of the policies and regulations referred to in this case.

In addition, it should be noted that the Army's policy regarding long hair is constantly changing and that, according to an Associated Press report carried by local papers on May 31, 1970, "hair on top of the head can now be allowed to reach three inches in length." Thus, it is highly probable that the haircut which the Army found offensive a year ago would today be in complete conformity with Army regulations. There is no better testimony to the large number of men affected by the regulations and policies questioned in this case than the fact that the Army itself is revising its regulations in response to the pressures brought to bear by these large numbers of men.

III.

Errors Below.

The Courts below failed properly to construe the line of cases comprising *Schwartz* v. *Franklin*, 412 F.2d 763 (CA 9, 1969); *Even* v. *Clifford*, 287 F. Supp. 334 (S.D. Cal., 1968); *Winters* v. *U. S.*, 281 F. Supp. 289 (E.D.N.Y., 1968); *Pfile* v. *Corcoran*, 287 F. Supp. 554 (D. Colo., 1968); and *Fox* v. *Brown*, 402 F.2d 837 (CA 2, 1968), in light of this Court's

* August 12, 1969, 24:8; August 23, 1969, 32:4; September 4, 1969, 1:2; September 15, 1969, 52:3; December 10, 1969, 24:1; December 11, 1969, 37:8; February 2, 1970, 2:6, 7.

later decisions in *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460, 24 L. Ed.2d 653 (1970) and *Gutknecht* v. *United States*, 396 U.S. 295, 24 L. Ed.2d 532 (1970).

All of the cases cited concede that retroactive application of 10 U.S.C. 673a to Reservists situated similarly to petitioner results in an impairment of constitutionally protected rights. However, in each case the Court found that the impairment was insubstantial inasmuch as activation through Selective Service in accordance with the delinquency regulations would achieve the same or a less salutary result as direct activation. But take away the delinquency regulations, as this Court has done by its decisions in *Breen* and *Gutknecht, supra,* and you have an entirely different result. The Reservist who is reported to Selective Service, in the absence of the delinquency rgulations, is simply stripped of his 1-D deferment and placed in the available manpower pool, to be dealt with in the same manner as any other registrant. That the difference may be substantial may be seen from the decision in *United States ex rel. Caputo* v. *Sharp,* 386 F. Supp. 516 (E.D. Pa., 1968).

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to review the judgments below.

Respectfully submitted,

LAWRENCE P. WEISMAN
955 Main Street
Bridgeport, Connecticut 06603

Attorney for Petitioner

July , 1970

APPENDIX A

Statutes and Regulations

10 U.S.C. 673a

§ 673a. Ready Reserve: members not assigned to, or participating satisfactorily in, units

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.

(c) To achieve fair treatment among members of the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to—

(1) family responsibilities; and

(2) employment necessary to maintain the national health, safety, or interest.

10 U.S.C. 270(b)

(b) A member of the Ready Reserve covered by this section who fails in any year to satisfactorily perform the training duty prescribed in subsection (a), as determined by the Secretary concerned under regulations to be prescribed by the Secretary of Defense, may be ordered without his consent to perform additional active duty for training for not more than 45 days. If the failure occurs during the last year of his required membership in the Ready Reserve, his membership is extended until he performs that additional active duty for training, but not for more than six months.

50 U.S.C. App. 456(2)(A)

(2) (A) Any person, other than a person referred to in subsection (d) of this section, who—

(i) prior to the issuance of orders for him to report for induction; or

(ii) prior to the date scheduled for his induction and pursuant to a proclamation by the Governor of a State to the effect that the authorized strength of any organized unit of the National Guard of that State cannot be maintained by the enlistment or appointment of persons who have not been issued orders to report for induction under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix]; or

(iii) prior to the date scheduled for his induction and pursuant to a determination by the President that the strength of the Ready Reserve of the Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve cannot be maintained by the enlistment or appointment of persons who have not been issued orders to report for induction under

this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix];

enlists or accepts appointment, before attaining the age of 26 years, in the Ready Reserve of any Reserve component of the Armed Forces, the Army National Guard, or the Air National Guard, shall be deferred from training and service under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] so long as he serves satisfactorily as a member of an organized unit of such Reserve or National Guard in accordance with section 270 of title 10 or section 502 of title 32, United States Code, as the case may be, or satisfactorily performs such other Ready Reserve service as may be prescribed by the Secretary of Defense. Enlistments or appointments under subparagraphs (ii) and (iii) of this clause may be accepted notwithstanding the provisions of section 15(d) of this title [section 465(d) of this Appendix]. Notwithstanding the provisions of subsection (h) of this section, no person deferred under this clause who has completed six years of such satisfactory service as a member of the Ready Reserve or National Guard, and who during such service has performed active duty for training with an armed force for not less than four consecutive months, shall be liable for induction for training and service under this Act, except after a declaration of war or national emergency made by the Congress after August 9, 1955. In no event shall the number of enlistments or appointments made under authority of this paragraph in any fiscal year in any Reserve component of the Armed Forces or in the Army National Guard or the Air National Guard cause the personnel strength of such Reserve component or the Army National Guard or the Air National Guard, as the case may be, to exceed the personnel strength for which funds have been made available by the Congress for such fiscal year.

STATE OF CONNECTICUT
MILITARY DEPARTMENT
OFFICE OF THE ADJUTANT GENERAL
STATE ARMORY, HARTFORD, CONN., 06115

18 March 1969

STATE REGULATION
NUMBER 26*

SATISFACTORY PARTICIPATION

1. This regulation provides information and instructions for carrying out the policies and procedures governing satisfactory participation for members of the Army National Guard as required by AR 135-91.

2. Commanders at all echelons should have a thorough knowledge of the regulation to insure that all procedures and actions are followed carefully. It is imperative that all actions required by the regulation be accomplished in a complete and timely manner, immediately following each period of unsatisfactory service or unexcused absence.

3. The following definition of "neat and soldierly appearance" is furnished to assist unit commanders:

a. The face will be kept clean-shaven, but a short, neatly trimmed mustache may be worn. A beard may be worn only when temporarily approved by medical

* This regulation supersedes State Regulation 26, 9 October 1963; State Regulation 26-1, 11 September 1964; letter, Hq First U. S. Army, AHAAG-CA, subject: Compliance with DA Circular 135-10, 7 March 1968, with 1st Indorsement, this Hq, 18 April 1968; and letter, TAG Conn., subject:, Compliance with DA Circular 135-10, 13 June 1968.

officers for medical reasons. Such approval will be limited initially to three months, but may be extended if considered necessary by the medical authorities.

b. Hair must be neat and closely trimmed. It may be clipped at the edges of the sides and back, but must present an evenly graduated appearance. Long and conspicuous sideburns are prohibited. Sideburns must not be longer than to the center of the ear opening and be trimmed in a graduated manner.

c. Articles such as pencils, pens, watch chains, fobs, pins, jewelry, handkerchiefs, combs, cigars, cigarettes, pipes, and sunglasses cases will not be worn or carried exposed on the service uniform. The wearing of wristwatches, identification bracelets, and rings is permitted. Conservative sunglasses may be worn, but not in military formations.

4. This headquarters has prepared a check list to assist commanders (Appendix I), which will not be used in place of the regulation but in conjunction therewith. The check list contains the steps to be followed and the forms to be used.

5. The forms and form letters pertinent to the procedures are contained in appendixes to this regulation.

APPENDIX B

Opinion of the United States Court of Appeals, Second Circuit

No. 768—September Term, 1969.

(Argued May 8, 1970 Decided June 2, 1970.)

Docket No. 34585

FRANK GIANATASIO, JR.,

Plaintiff-Appellant,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, Commanding Officer, Company "A" 242nd Engineer Battalion (C) (A) Connarng, Stratford, Connecticut; MAJOR GENERAL E. DONALD WALSH, Adjutant General for the State of Connecticut; LIEUTENANT GENERAL JONATHAN O. SEAMAN, Commanding General, First United States Army, Fort George G. Meade, Maryland; and MAJOR GENERAL WINSTON P. WILSON, Chief National Guard Bureau, Washington, D. C.,

Defendants-Respondents.

Before:

LUMBARD, *Chief Judge,*

WATERMAN, *Circuit Judge,* and JAMESON, *District Judge.**

---

* Of the District of Montana, sitting by designation.

Appellant, a member of the Connecticut National Guard who has been ordered into active military service for not participating satisfactorily in his unit at drill, sought to enjoin his induction. The United States District Court for the District of Connecticut, Zampano, *J.*, denied a motion for a preliminary injunction, and, upon appeal, the order below is *Affirmed.*

LAWRENCE P. WEISMAN, Bridgeport, Conn., *for appellant.*

RICHARD P. CRANE, JR., Asst. United States Attorney; Stewart H. Jones, United States Attorney, District of Connecticut, *for defendants-respondents.*

WATERMAN, *Circuit Judge*:

The appellant, Frank Gianatasio, Jr., enlisted in the Connecticut Army National Guard on July 14, 1965, Bastille Day. This fortuitous connection with one of the world's great national holidays commemorating the overthrow of despotic power by non-conformists was of no moment for three and one half years here, until, symbolically, appellant's commanding officer in January and March 1969 concluded on eleven drill occasions when appellant was physically present and ready to participate in drills that appellant's long hair caused him to be guilty of "unsatisfactory participation" in unit drills. It appeared to the citing officer, defendant First Lt. Eamonn M. Whyte, that because Army Regulation 135-91 5(d)(2) requires National Guard members to present a "neat appearance" to the world around them appellant's non-conforming hairdo should be equated with "unsatisfactory participation."

Gianatasio insisted that he did have a really "neat" haircut by any but army standards and argued that long hair was essential to his civilian work. His employer, the manager of the Shoe Bazaar in Westport, Connecticut, wrote the Guard that ". . . since it is now fashionable for men to have long hair and since Frank is now a salesman of fashionable shoes and clothing he could not possibly sway someone toward a look, that with a short haircut, he would appear for all purposes, not to understand." The manager added, "If there are any questions please do not hesitate to call."

First Lieutenant Whyte was not impressed with this reasoning. He did not call or acknowledge the letter but instead, in answer to a later letter, wrote to appellant's employer on March 24, 1969. He stated that "Due to circumstances involved with this man he is now pending action to be inducted into the Army of the United States for a period of two years. This individual is not a conformist as far as the army way of life as he will not apply himself with his obligation to the United States Government."

Appellant appeared before the State Adjutant General on April 24, 1969, and as a result was given a further opportunity to comply with the "neat appearance" regulation. However, Gianatasio's hair was judged unsatisfactory by Lieutenant Whyte on two further occasions after this date, and on July 1, 1969 plaintiff was ordered to report on August 7 for active duty in the Army for a period of 24 months less time already served on active duty. At this point we are constrained to note that the Guard seems not to have considered that appellant's hair impeded him in the performance of military duties, but only that his hair length did not conform to aesthetic requirements. Gianatasio's appeal from this order within the National

Guard failed. Thereupon he instituted this action in the United States District Court for the District of Connecticut for a declaratory judgment that Army Regulation 135-91 and procedures followed pursuant thereto violated the United States Constitution, sought the convening of a statutory three-judge district court, and injunctions reinstating him in the National Guard and preventing his activation. He also claimed damages of $25,000. The defendants moved for summary judgment in their favor. The lower court denied plaintiff's application for a three-judge court and for a preliminary injunction and granted defendants' motion for summary judgment. Gianatasio appeals.

Appellant argues that his order to report for active duty is an arbitrary impairment of his constitutional rights in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. In his enlistment contract with the National Guard, Gianatasio agreed that "If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction." This contract language was authorized by 50 U.S.C. App. §456(c)(2)(D), which stated that "any person enlisted or appointed after October 4, 1961, in the Ready Reserve of any reserve component of the Armed Forces . . . who fails to serve satisfactorily during his obligated period of service . . . may be selected for training and service and inducted into the armed force of which such reserve component is a part, prior to the selection and induction of other persons liable therefor."

Instead of reporting Gianatasio to the Selective Service System for induction, however, the Guard ordered him

directly into active duty pursuant to 10 U.S.C. §673a,[1] enacted subsequent to appellant's enlistment. Appellant maintains that, even assuming *arguendo* that he was indeed guilty of "unsatisfactory participation," this retroactive application violates his contractual right to be inducted, if he may be inducted at all, through the Selective Service System. This violation, he contends, is highly prejudicial to him for he claims he might have qualified for a deferment if he had been processed through Selective Service, a possibility foreclosed to him by the order to report directly for active duty.

We disagree that appellant would have had an opportunity to qualify for a deferment if he had been processed through his draft board, and we therefore find that the retroactive application of Section 673a did not harm

---

1 Section 673a reads:

§673a. Ready Reserve: members not assigned to, or participating satisfactorily in, units.

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligations; and

(3) has not served on active duty for a total of 24 months.

(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.

(c) To achieve fair treatment among members of the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to—

(1) family responsibilities; and

(2) employment necessary to maintain the national health, safety, or interest.

appellant in any tangible way. At the time of his enlistment 32 C.F.R. 1631.8 provided, pursuant to 50 U.S.C. App. §456(c)(2)(D), that "any registrant enlisted . . . in the Ready Reserve of any reserve component of the Armed Forces . . . who fails to serve satisfactorily during his obligated period of service as a member of such Ready Reserve . . . as certified by the respective Armed Force, shall be ordered to report for induction by the local board *regardless of the class in which he is classified and without changing his classification.*" (Emphasis supplied.) We have already held, applying this clear language, that "the Local Board's responsibility was solely ministerial, to bring into active service a soldier who had already enlisted and whose reserve status had been terminated; the Regulations as to the right to a hearing with respect to a classification or refusal to reopen one were thus inapplicable." *United States* v. *Lonstein*, 370 F.2d 318, 320 (2 Cir. 1966). Inasmuch as Gianatasio, if he were to be processed through Selective Service, would have no right to reclassification, we do not see what right he lost by being activated through a procedure which bypassed the local draft board.

Appellant contends that this interpretation of Section 456 and our holding in *Lonstein* are now invalid because of *Gutknecht* v. *United States*, 396 U.S. 295 (1970) and *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460 (1970). We do not agree. The Supreme Court there held that Congress had not granted the President and the Selective Service System the right to remove a civilian registrant from a deferred classification to punish him for acts meriting criminal punishment under other provisions of federal law. Appellant's situation is quite different

from the situations present in *Gutknecht* and in *Breen*, for Congress specifically provided that induction could follow unsatisfactory performance in the National Guard, and Gianatasio agreed to this congressional provision when he signed his National Guard contract. Appellant does not challenge the fact that this contract is valid and binding. Gutknecht and Breen were civilian draft registrants, not National Guardsmen.

Second, appellant argues that the army regulation implementing 10 U.S.C. §673a contradicts regulations promulgated by the Secretary of Defense, specifically 32 C.F.R. 101.3-101.5. These regulations, however, do not in any way purport to provide exclusive induction procedures which would bar direct orders to report to active duty authorized by 10 U.S.C. §673a. The thrust of appellant's argument, if there is one, eludes us at this point. Moreover, the Government points out that these regulations were supplanted on January 9, 1969 by a new Department of Justice Directive 1215.13, 34 F.R. 130, which specifically authorizes resort to 10 U.S.C. §673a.

Third, appellant argues that his order to active duty constitutes the imposition of a punishment by the Government without the protection of constitutionally required procedural rights, such as counsel, cross-examination, compulsory process, an impartial tribunal, public trial, and others. Appellant cites *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963) and *United States* v. *Brown*, 381 U.S. 437 (1965). Appellant overlooks the fact, however, that he agreed in his enlistment contract to immediate induction into the active service should he "fail to participate satisfactorily" in the National Guard. Even assuming that this contract agreement did not waive any procedural rights which might otherwise have existed without it, Gianatasio

does not intimate that he has actually been injured by the lack of any of these procedures. He does not here contest the fact that his hair is longer than National Guard standards permit, nor does he allege that he would have made such a contention to the Guard in hearings which were not made available to him or were not fairly conducted. He have already held that the military has wide discretion in regulating hair length. See *Raderman* v. *Kaine*, 411 F.2d 1102 (2 Cir. 1969). Therefore, inasmuch as Gianatasio has failed to show or even allege that he might have substantive rights to protect, we fail to see how any hypothetical deprivation of procedural rights can harm him.

Appellant's final argument apparently seeks to have us overrule *Raderman* v. *Kaine*, *supra*, on grounds that the Guard's "neat appearance" rules unjustly deprive him of his right to a livelihood in civilian life. We decline so to rule and note in the words of the court below ". . . that the plaintiff could have worn an appropriate wig, thereby complying with military requirements and satisfying the appearance needs of his job."

Affirmed.

Opinion of the United States District Court, District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13371

FRANK GIANATASIO, JR.,

Plaintiff,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, *et als.*,

Defendants.

Memorandum of Decision

The plaintiff, a National Guard reservist, seeks declaratory and injunctive relief from an order assigning him to involuntary active duty for a period of approximately 18 months in the United States Army.[1]

The basic facts have been stipulated. On July 14, 1965, the plaintiff enlisted in the Connecticut Army National Guard for a period of six years, three months of which were to be active duty and the balance by regular attendance at drills. In the first three months of 1969, the plaintiff was cited by his commanding officer, defendant Whyte, for "unsatisfactory participation" in unit drills by reason of

[1] The plaintiff has withdrawn his charge of libel against defendant Whyte; the plaintiff's motion to convene a three-judge court was denied by this Court on September 23, 1969.

his long hair, which was considered not to comply with Army Regulation 135-91, 5d(2), concerning "neat and soldierly appearance." Plaintiff, supported by a letter from his employer, claims that a certain "modish" appearance was required in his employment as a salesman in a women's shoe salon.

On April 24, 1969, plaintiff appeared before the State Adjutant General who gave him a further opportunity to comply with the relevant regulations pertaining to appearance. Thereafter, on two occasions, plaintiff's commanding officer determined that the length of his hair was still unsatisfactory. Subsequently he was ordered to report for active duty on August 7, 1969, and after a delay during which an appeal was taken, and denied, the plaintiff was given notice to submit to active duty on September 10, 1969. The instant action followed. The plaintiff now requests that a preliminary injunction issue; the defendants move for summary judgment.

The plaintiff claims his active duty order is invalid on three grounds: 1) it constitutes punishment without due process of law; 2) it is a breach of his "contract" with the National Guard, and 3) it deprives him of his constitutionally protected right to retain long hair.

I.

The plaintiff first contends that the decision-making process to activate him is analogous to the accusatory process of a criminal or quasi-criminal proceeding. Due process under these circumstances, he argues, entitles a reservist to the full panoply of procedures and rights accorded a defendant, including the right to counsel, a public trial, and a trial by jury. However, the activation of

a reservist for unsatisfactory performance is far from a criminal prosecution. A more parallel situation would be the classification proceedings before a Selective Service Board wherein a delinquent registrant is not afforded the constitutional rights and privileges of a defendant. *United States* v. *Dicks*, 392 F.2d 524, 528 (4 Cir. 1968).

Various avenues of review are available to the reservist who wishes to challenge his call-up order, see, e.g., 10 U.S.C. § 938, Army Regulation 135-91; due process does not require more. *Raderman* v. *Kaine*, 411 F.2d 1102, 1104 (2 Cir. 1969); *Smith* v. *Resor*, 406 F.2d 141, 147 (2 Cir. 1969); *Kalish* v. *United States*, —— F. Supp. —— (E.D. Mich. 1969). In the instant case, unlike the facts in *Smith* v. *Resor, supra*, there is no evidence that the plaintiff's procedural rights of review under the applicable statutes and military regulations were violated.

II.

Plaintiff further claims that his order to active duty under 10 U.S.C. § 673a is an unconstitutional impairment of the enlistment contract he signed in 1965, which reads in pertinent part:

> If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

On October 15, 1966, Congress passed Public Law 89-687, now codified in 10 U.S.C. § 673a, which empowered the President to order reservists whose participation was unsatisfactory to active duty for 24 months less time already

served on active duty. This new law, in effect, added a third procedure available to the Army to activate a delinquent reservist, and is the authority for the order at issue here.

The plaintiff argues "that the sanctions available to punish him for unsatisfactory service are fixed by that contract (signed by him prior to the passage of § 673a) and that to apply 10 U.S.C. § 673a to deprive him of the contractual rights thus acquired" would violate his constitutional rights.

Similar claims have been advanced and rejected in many cases; it is now well-established that the provisions of § 673a may be applied retroactively to activate a reservist who has not performed satisfactorily. See, e.g., *Fox* v. *Brown*, 402 F.2d 837 (2 Cir. 1968), cert. denied, 394 U.S. 938 (1969); *Winters* v. *United States*, 281 F. Supp. 289 (E.D.N.Y.), aff'd mem., 390 F.2d 879 (2 Cir.), cert. denied, 393 U.S. 896 (1968); *Johnson* v. *Powell*, 414 F.2d 1060 (5 Cir. 1969); *Schwartz* v. *Franklin*, 412 F.2d 736 (9 Cir. 1969); *Even* v. *Clifford*, 287 F. Supp. 334 (S.D. Calif. 1968).

Plaintiff relies heavily on the cases of *Harmonson* v. *United States*, —— F. Supp. —— (C.D. Calif. 1969), and *Gion* v. *McNamara*, —— F. Supp. —— (C.D. Calif. 1968). However, the *Harmonson* case was summarily reversed by the Ninth Circuit on July 7, 1969, and the reasoning of the *Gion* case was not accepted by the Court of Appeals for this Circuit in *Fox* v. *Brown, supra*, at 841.

III.

Finally, plaintiff contends that the regulation governing a reservist's appearance is an unconstitutional restraint upon his right to civilian employment. This contention must be rejected on the authority of *Raiderman* v. *Kaine*,

supra. In addition, the Court notes that the plaintiff could have worn an appropriate wig, thereby complying with military requirements and satisfying the appearance needs of his job.

IV.

Accordingly, the plaintiff's motion for a preliminary injunction is denied, and the defendants' motion for summary judgment is granted.

Dated at New Haven, Connecticut, this 12th day of January, 1970.

ROBERT C. ZAMPANO
United States District Judge

Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13,371

FRANK GIANATASIO, JR.,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, *et als.*

The Court having filed its Memorandum of Decision denying plaintiff's motion for preliminary injunction and granting defendants' motion for summary judgment,

It is Ordered, Adjudged and Decreed that this action is hereby dismissed on the merits and that defendants have their costs of action.

Dated at New Haven, Connecticut, this 14th day of January, 1970.

GILBERT C. EARL
Clerk,
United States District Court

By Frances J. Consiglio
Deputy In Charge

APPENDIX C

Enlistment Agreement

(Age 17 through 25)

Date: 14 July 1965 Place: Stratford, Connecticut

In connection with my enlistment in the Army National Guard of the State of Connecticut and as a Reserve of the Army for service in the Army National Guard of the United States, this date, I hereby agree to and understand that—

I incur a military service obligation of 6 years.

I will participate with my unit in scheduled training effective immediately.

I will enter on active duty for training for a period of approximately 26 weeks (enter time required for training in designated MOS) within 120 days of this date, unless a delay for a longer period is authorized by the Department of the Army. If I am a high school student, I may be delayed in reporting for active duty for training for not more than one year, until I graduate, or until I cease to pursue such course satisfactorily, whichever occurs earlier.

After completing the active duty for training, I will serve in the Ready Reserve for the remainder of my 6 year military service obligation. If for any reason I cannot satisfactorily complete the required training (schooling) in the MOS for which I originally entered on active duty for training, I will be required to accept training of a duration not to exceed 6 months to qualify in an alternate MOS as determined by the Army and/or my unit commander.

During my Ready Reserve service, both before and after my active duty training, I am required to participate satisfactorily in the scheduled drills (at least 48 each year) and attend field training at least 15 days each year, unless excused therefrom by proper authority. Should I be assigned to the Ready Reserve Mobilization Reinforcement Pool during the 6 year period, I will, when directed, perform not more than 30 days active duty for training annually.

I must, prior to moving to another location (town, city, community, state), report any change of address to my unit commander or his representative. Within 30 days after arriving at my new home of residence, I must report to the nearest Army National Guard Armory of U. S. Army Reserve Training Center for instructions and possible assignment. If, prior to this time, I have not performed my initial active duty for training as agreed to above, I realize that, at a time convenient to the service but in any case before I have completed one year of my 6 year military service obligation, I must enter on this active duty for training or 6 months active duty for training as determined by the needs of the service in my new area of residence.

I must reply promptly to any military correspondence directed to me. I further understand that—

If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

In the event of war or national emergency declared by Congress my enlistment, which would otherwise expire, will be continued in effect until 6 months after the end of such war or emergency, unless sooner terminated.

Typed first, middle, last name
FRANK GIANATASIO JR.

Signature
FRANK GIANATASIO JR.

Typed name unit commander or authorized representative (witness)
RALPH A. CENNAMO

Signature
RALPH A. CENNAMO

Exhibit A

THE SHOE BAZAAR

Footwear for Men and Women

Office: 829 Lancaster Avenue Bryn Mawr, Pa. 19010

LAwrence 5-4883

To whom it may concern:
RG: Frank Gianatsio Jr.
P.F.C. Co. A. 242nd ENG.
Stratford Armory
Stratford, Conn.

Gentlemen,

Frank has been in my employ for two months and is doing a great job. He has a definite future with our company. Our business is a fashion business and since Frank is now in this line of work he must, to be an effective part of our organization, look and dress accordingly. I respectfully understand proper haircuts are part of the uniform and discipline of the National Guard but since it is now fashion-

able for men to have long hair and since Frank is now a salesman of fashionable shoes and clothing he could not possibly sway someone toward a look, that with a short haircut, he would appear for all purposes, not to understand. Due to the circumstances I would sincerely appreciate your making a concession on his part. Since getting a haircut would hinder Franks earning living and his future in this business. If there are any questions please do not hesitate to call.

Respectfully,

Daniel Tuossoli, Manager

/s/ Daniel Tuossoli
Shoe Bazaar 226-4949
22 Main St.
Wspt., Conn.

was told by
Cpt. Graze to get
Haircut on 6 Oct. 68